A

Chin Chee Keong v Toling Corp (M) Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–411–03 OF 2014
ZAWAWI SALLEH, BADARIAH SAHAMID AND MARY LIM JJCA
8 APRIL 2016

C *Companies and Corporations — Lifting of corporate veil — Piercing of corporate veil — Respondent sued company — Company failed to pay judgment sum — Appellant director of company — Respondent sued appellant to be personally liable — Burden of proof to be proven — Whether action against appellant must be maintained in same action taken against company — Whether appellant* D *personally liable — Whether separate action against director allowed — Common law position for personal liability — Companies Act 1965 s 304(1)*

This instant appeal was against the decision of the High Court in allowing the respondent's claim under s 304(1) of the Companies Act 1965 ('the Act'). The E respondent/plaintiff was a company which supplied plastic resin to a company called Pacific Plastic Industries Sdn Bhd ('the company') for the period between 9 October 2003–24 February 2004 amounting to RM588,093 ('the debt'). Due to the failure of the company to pay the debt, the respondent obtained judgment in default against the company. The company failed to pay F the judgment sum and consequently, the respondent sued the appellant/first defendant who was the director of the company to be personally liable for the sum. The respondent contended that the appellant had carried on the business of the company with intention to defraud the respondent as the company's creditor and that the appellant had no intention of paying the debt from the G outset. In defence, the appellant submitted that previously, the company had always paid for all its purchased and denied carrying out business of the company with intent of defrauding the respondent. Due to the financial crisis of 2003/2004, they had to sell their business premises and took down the signboard. The proceeds of the sale were paid to OCBC Bank Bhd in H settlement of the loan while a small portion of the monies was paid into the account of the company. The appellant pleaded that, Bakti Emas Sdn Bhd which was allegedly owned by directors of the company had no relevance to the company and thereby no bearing on the claim. Further, the appellant contended that, there were no personal or business relationships with Bakti I Emas Sdn Bhd or Finger Touch Body Care or its directors or shareholders. At the end of the proceeding, the learned trial judge found that the respondent had established a case against the appellant under s 304(1) of the Act and allowed the respondent's claim. Hence, this appeal. The main issues raised in this appeal were, firstly, with regard the burden of proof under s 304(1) of the

Act; secondly, whether the action against the appellant must be maintained in the same action taken against the company; thirdly, whether the appellant was liable under s 304(1) of the Act; fourthly, whether the respondent could file a separate or subsequent suit to declare a director who defrauded a creditor to be personally liable for the debt of the company under s 304(1) of the Act; and lastly, the position in common law of such liability on the part of the directors.

Held, dismissing the appeal with costs:

(1) The court agreed with the learned High Court judge that the applicable standard of proof for statutory claim under s 304(1) of the Act was on a balance of probabilities. Not so much because this is the standard under civil fraud but because s 304(1) itself sets the standard of proof that must be met. The term if 'it appears' is deployed in the provision and this clearly indicates that a lower degree of proof is required. That lower degree of proof is on a balance of probabilities. It cannot go any lower than the civil burden of proof (see paras 27 & 29).

(2) The court agreed with the learned High Court judge that the appellant did not need to be sued in the same suit taken against the company, indeed separate proceedings ought to be taken. Since the respondent relied on the second limb of s 304(1) of the Act, the respondent necessarily had to sue the company first, secure judgment in its favour which renders it the status of 'creditor' before initiating an action under s 304(1) of the Act (see para 43).

(3) The court had examined the same pieces of evidence as the learned High Court judge and agreed with the findings that the business of the company had indeed been carried out 'with intent to defraud creditors or for any fraudulent purpose'. The company was 'not in the position to pay its creditors when the debts would fall due' and this was evidenced by the company's non-payment for the purchases or even the judgment debt. Further, the appellant did not challenge or explain that the company was not in debt and that it was able to pay its creditors, especially the respondent (see paras 47–49).

(4) From the circumstances, the intention of the appellant to defraud the respondent could be reasonably inferred where the company had no profit generating business at the material time yet the appellant placed unusually large orders and unable to explain how he was going to honour the company's obligations. On the contrary, the appellant never even suggested that there was a reasonable prospect of the company paying the respondent. Under such conditions, the court was entitled to infer that the appellant knowingly was a party to the fraudulent trading of the company. The only relevant period for the purpose of s 304(1) of the Act was the period between 2003 and 2004. So long as the respondent could prove that the debt was incurred during the period when the company

was insolvent by ordering the goods from the respondent knowing that the respondent had no reasonable prospect of being paid; that was sufficient proof for a case under s 304(1) of the Act. This was regardless that the transaction was a one-off transaction (see paras 58 & 61).

(5) The High Court judge rejection of the appellant's defence of absolution by reason of having informed the respondent of its cash flow problems was right. There was cogent evidence that from the beginning that the appellant had no intention of paying the respondent. The company was already in financial difficulties and in debt. Despite having knowledge that the company had no reasonable prospect of paying the respondent for the purchases made, the appellant and the second defendant in the court below who were the only directors of the company, went ahead with the purchases (see para 63).

(6) This was a proper case to invoke s 304(1) against the appellant. Section 304(1) of the Act is the statutory enunciation of the common law principle of piercing the veil of incorporation where there is fraud; the fact that the respondent had made this alternative plea did not alter the position that it had this right of action (see para 64).

[Bahasa Malaysia summary

Rayuan segera ini adalah terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan responden di bawah s 304(1) Akta Syarikat 1965 ('Akta'). Responden/plaintif adalah sebuah syarikat yang membekalkan resin plastik untuk syarikat dikenali sebagai Pacific Plastic Industries Sdn Bhd ('syarikat') untuk tempoh antara 9 Oktober 2003–24 Februari 2004 berjumlah RM588,093 ('hutang'). Disebabkan kegagalan syarikat tersebut untuk membayar hutang, responden memperoleh penghakiman ingkar terhadap syarikat tersebut. Syarikat gagal membayar jumlah penghakiman dan seterusnya, responden menyaman defendan pertama/perayu yang merupakan pengarah syarikat tersebut untuk bertanggungan secara peribadi untuk jumlah tersebut. Responden berhujah bahawa perayu telah menjalankan perniagaan syarikat tersebut dengan niat untuk menipu responden sebagai pemiutang syarikat dan bahawa perayu tidak mempunyai niat untuk membayar hutang tersebut dari awal lagi. Dalam pembelaan, perayu berhujah bahawa sebelum ini, syarikat tersebut sentiasa membayar sepenuhnya untuk pembeliannya dan menafikan menjalankan perniagaan syarikat tersebut dengan niat menipu responden. Berikutan krisis kewangan 2003/2004, mereka terpaksa menjual premis perniagaan mereka dan menurunkan papan tanda. Hasil jualan telah dibayar kepada OCBC Bank Bhd bagi menjelaskan pinjaman manakala sebahagian kecil daripada wang dibayar ke dalam akaun syarikat. Perayu memplid bahawa, Bakti Emas Sdn Bhd yang didakwa dimiliki oleh pengarah syarikat tersebut tidak mempunyai kaitan dengan syarikat dan dengan itu tidak mempunyai kaitan dengan tuntutan tersebut. Seterusnya, perayu berhujah bahawa tiada hubungan peribadi atau perniagaan dengan Bakti Emas Sdn Bhd

atau Finger Touch Penjagaan Badan atau pengarah atau pemegang sahamnya. Di akhir prosiding, hakim perbicaraan yang bijaksana mendapati bahawa responden berjaya membuktikan kes terhadap perayu di bawah s 304(1) Akta dan membenarkan tuntutan responden. Oleh itu, rayuan ini dibuat. Isu-isu utama yang dibangkitkan dalam rayuan ini adalah, pertamanya, dengan mengambilkira beban bukti di bawah s 304(1) Akta; kedua, sama ada tindakan terhadap perayu mesti dikekalkan dalam tindakan sama yang diambil terhadap syarikat tersebut; ketiga, sama ada perayu adalah bertanggungan di bawah s 304(1) Akta; keempat, sama ada responden boleh memfailkan saman yang berasingan atau yang berikutnya untuk mengisytiharkan pengarah yang menipu pemiutang bertanggungan secara peribadi untuk hutang-hutang syarikat tersebut di bawah s 304(1) Akta; dan akhir sekali, kedudukan dalam common law berkenaan liabiliti tersebut adalah di pihak para pengarah.

Diputuskan, menolak rayuan dengan kos:

(1) Mahkamah bersetuju dengan hakim Mahkamah Tinggi yang bijaksana bahawa standard pembuktian yang terpakai untuk tuntutan statutori di bawah s 304(1) Akta adalah atas imbangan kebarangkalian. Tidak berlebihan kerana ini adalah standard di bawah penipuan sivil tetapi disebabkan s 304(1) sendiri yang menetapkan standard pembuktian yang perlu dipenuhi. Istilah jika 'ternyata' digunakan dalam peruntukan tersebut dan ini jelas menunjukkan bahawa tahap pembuktian yang lebih rendah diperlukan. Bahawa tahap yang lebih rendah daripada pembuktian adalah atas imbangan kebarangkalian. Tahap tersebut tidak boleh lebih rendah daripada beban pembuktian sivil (lihat perenggan 27 & 29).

(2) Mahkamah bersetuju dengan hakim Mahkamah Tinggi yang bijaksana bahawa perayu tidak perlu disaman untuk guaman yang sama dikenakan terhadap syarikat tersebut, malahan prosiding berasingan yang sepatutnya digunakan. Memandangkan responden bergantung kepada peruntukan kedua s 304(1) Akta, responden semestinya perlu menyaman syarikat terlebih dahulu, mendapatkan penghakiman memihak kepada mereka yang memberikannya status 'pemiutang' sebelum memulakan tindakan di bawah s 304(1) Akta (lihat perenggan 43).

(3) Mahkamah telah memeriksa keterangan yang sama sepertimana hakim Mahkamah Tinggi yang bijaksana dan bersetuju dengan dapatan bahawa perniagaan syarikat tersebut telah dijalankan 'dengan niat untuk menipu pemiutang atau untuk tujuan penipuan'. Syarikat adalah 'tidak berada dalam kedudukan untuk membayar pemiutangnya apabila hutang tersebut terhutang' dan ini dibuktikan dengan ketidakbayaran syarikat untuk pembelian mahupun hutang penghakiman. Seterusnya, perayu tidak mencabar atau menjelaskan bahawa syarikat tidak berada dalam

keberhutangan dan syarikat mampu untuk membayar pemiutangnya, terutamanya responden (lihat perenggan 47–49).

(4) Daripada keadaan sekeliling, niat perayu untuk menipu responden secara munasabah boleh diandaikan di mana syarikat tersebut tidak mempunyai perniagaan yang menjana keuntungan pada masa material tetapi perayu membuat pesanan luar biasa besar dan tidak dapat menjelaskan bagaimana dia akan melaksanakan kewajipan syarikat. Sebaliknya, perayu tidak pernah mencadangkan bahawa terdapat prospek munasabah untuk syarikat membayar responden. Di bawah keadaan tersebut, mahkamah berhak untuk membuat kesimpulan bahawa perayu dengan sengaja menjadi pihak kepada penipuan perdagangan syarikat. Satu-satunya tempoh relevan untuk tujuan s 304(1) Akta adalah tempoh di antara 2003 dan 2004. Selagi responden boleh membuktikan bahawa hutang tersebut telah terkumpul dalam tempoh apabila syarikat tersebut adalah insolven dengan membuat pesanan barang daripada responden dengan mengetahui bahawa responden tidak mempunyai harapan untuk dibayar; itu adalah bukti yang mencukupi untuk kes di bawah s 304(1) Akta. Ini tanpa mengambil kira bahawa transaksi tersebut adalah transaksi satu kali sahaja (lihat perenggan 58 & 61).

(5) Penolakan pembelaan perayu untuk pengampunan oleh hakim Mahkamah Tinggi disebabkan dia telah memaklumkan kepada responden mengenai masalah aliran tunainya adalah wajar. Terdapat bukti kukuh bahawa dari awal lagi perayu tidak mempunyai niat untuk membayar responden. Syarikat tersebut telah mengalami masalah kewangan dan hutang. Walaupun mempunyai pengetahuan bahawa syarikat tersebut tidak mempunyai harapan untuk membayar responden bagi pembelian yang dibuat, perayu dan defendan kedua di mahkamah rendah yang merupakan satu-satunya pengarah syarikat tersebut, meneruskan dengan pembelian (lihat perenggan 63).

(6) Ini merupakan kes yang wajar untuk menggunakan s 304(1) terhadap perayu. Seksyen 304(1) Akta adalah diksi statutori berhubung prinsip undang-undang *common law* yang menusuk tabir perbadanan di mana terdapat penipuan; fakta bahawa responden telah membuat rayuan alternatif tidak mengubah kedudukan bahawa responden mempunyai hak tindakan ini (lihat perenggan 64).]

Notes

For cases on piercing of corporate veil see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 525–526.

Cases referred to

Amrae Benchuan Trading Pte Ltd (in liquidation) v Tan Te Teck Gregory [2006] 4 SLR 969, HC (refd)
Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd [2016] 2 CLJ 563, CA (consd)
Cyber Village Sdn Bhd v Illustra IT (M) Sdn Bhd & Ors [2010] MLJU 1853; [2011] 4 CLJ 613, CA (refd)
Dato' Gan Ah Tee & Anor (in their capacity as liquidators of Par-Advance Sdn Bhd (in liquidation)) v Kuan Leo Choon & Ors [2012] 10 MLJ 706, HC (refd)
Kon Yin Tong and another v Leow Boon Cher and others [2011] SGHC 228, HC (refd)
LMW Electronics Pte Ltd v Ang Chuang Juay & Ors [2010] 1 MLJ 185, HC (refd)
Lama Tile (Timur) Sdn Bhd v Lim Meng Kwang & Anor [2015] 4 MLJ 85; [2015] 3 CLJ 763, CA (refd)
Lim Teck Cheng v Wyno Marine Pte Ltd (in liquidation) [1999] 4 SLR 673, CA (refd)
Liquidator of Leong Seng Hin Piling Pte Ltd v Chan Ah Lek & Ors [2007] 2 SLR 77, HC (refd)
M+W Singapore Pte Ltd v Leow Tet Sin & Anor [2015] SGHC 10; [2015] 2 SLR 271, HC (refd)
Morphitis v Bernasconi [2001] 2 BCLC 1; [2003] Ch 552, CA (refd)
R v Grantham [1984] QB 675, CA (refd)
Siow Yoon Keong v H Rosen Engineering BV [2003] 4 MLJ 569, CA (refd)
Tang Eng Iron Works Co Ltd v Ting Ling Kiew & Anor [1990] 2 MLJ 440, HC (refd)
Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd [1992] 2 MLJ 217; [1992] 1 CLJ Rep 331, SC (refd)
Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Companies Act 1965 ss 304, 304(1)
Corporations Act 2001 [AU] s 588G
Insolvency Act 1986 [UK] s 213

Appeal from: Civil Suit No 22–608 of 2009 (High Court, Penang)

Oh Teik Keng (Oh Teik Keng & Partners) for the appellant.
Saw Lip Khai (Chooi, Saw & Lim) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the learned High Court judge who allowed the respondent's claim against the appellant who was the first defendant in the court below. The respondent had sued the appellant as the first defendant and his mother as the second defendant under sub-s 304(1) of the

Companies Act 1965. The second defendant passed away before the trial got underway. The action was however not withdrawn; the second defendant's estate was represented by one Chin Chee Loy.

SOME BACKGROUND FACTS

[2] These are the facts as set out in the decision of the learned High Court judge. For easier understanding, the parties will be referred in their capacities before the High Court.

[3] The plaintiff is a company which supplies plastic resin used in the manufacture of plastic products. It supplied resin to a company called Pacific Plastic Industries Sdn Bhd ('the company') for the period between 9 October 2003 and 24 February 2004 amounting to RM588,093 ('the debt'). When the company failed to pay for the supply, the plaintiff sued the company vide Penang High Court Civil Suit No 22–45 of 2006 filed on 4 October 2006. The plaintiff obtained judgment in default against the company. That judgment for the sum of RM588,093 remains unsatisfied till this date.

[4] The plaintiff subsequently sued the defendants who were directors of the company seeking a declaration that the defendants be personally liable without any limitation of liability for the payment of the debt of RM588,093.

[5] The plaintiff's claim was based on sub-s 304(1) of the Companies Act 1965. The plaintiff claimed that the defendants are personally liable for the debt because as directors of the company at the material time, the defendants had carried on the business of the company with intention to defraud the plaintiff as the company's creditor. The plaintiff further alleged that the defendants in fact had no intention of paying the debt from the outset. The details of the allegations appear at para 8 of the statement of claim:

(a) the business of the company was carried out under the direction and control of the defendants as its directors;

(b) the first defendant had requested the plaintiff to supply raw materials to the company from the months of October 2003 till February 2004 without any intention of paying for it;

(c) the second defendant who at all times knew and should have known the business dealings of the company which was carried out by the first defendant had condoned and allowed the first defendant to carry out such activities;

(d) the defendants' company had not paid any portion of the debt owed;

(e) sometime in August 2005, after the plaintiff's solicitors had issued a letter of demand dated 10 August 2005 asking for payment of the debt due and owing, the defendants had removed its business signboard at its business

premises at No 3 Persiaran Perindustrian Silibin 2, Kawasan Perindustrian Ringan, Silibin, 30100, Ipoh, Perak and replaced it with Bakti Emas Industries Sdn Bhd;

(f) the new business, Bakti Emas Industries Sdn Bhd, was owned by Chee Kam Chan and Ng Sook Hua who are also directors of the said company; and

(g) the first defendant and Ng Sook Hua are business partners in a partnership firm called 'Finger Touch Body Care'.

[6] The plaintiff sought a declaratory order that the defendants be personally liable for the company's debt and that the defendants be ordered to pay the debt together with interest and costs.

[7] From the joint defence and further and better particulars provided pursuant to an order of court dated 23 August 2011, the defendants denied carrying on the business of the company with intent of defrauding the plaintiff. The defendants claimed that the company had dealt with the plaintiff since 1993 and had always paid for all its purchases. According to the defendants, in the financial crisis of 2003/2004, the company faced cash flow problems because many of its customers had not settled their debts with the company. With the company's weak financial capacity compounded by the financial crisis of 2003/2004, the company decided to sell its business premises at No 3 Persiaran Perindustrian Silibin 2, Kawasan Perindustrian Ringan, Silibin, 30100, Ipoh, Perak in 2004. Consequent to the sale to a company called Great Eastern Holding Sdn Bhd, the company's business signboard was taken down. It was sold for RM300,000.

[8] The defendants said that a substantial amount from the proceeds of the sale was paid to OCBC Bank Bhd in settlement of a loan while a small portion was paid into the account of the company. The precise amount paid to the company however, could not be ascertained due to lapse of time and because the records had been misplaced when the company moved.

[9] On the matter of Bakti Emas Sdn Bhd, the defendant pleaded that the business of Bakti Emas Sdn Bhd has no relevance to the company and thereby no bearing on the claim; and that the there are no personal or business relationship with Bakti Emas or Finger Touch Body Care or its directors or shareholders.

DECISION OF THE HIGH COURT

[10] The High Court found that the plaintiff had established a case against both defendants under s 304(1) of the Companies Act 1965. Consequently, the claim was allowed and the defendants were ordered to pay the debt which

in essence is the judgment debt entered earlier against the company. Being dissatisfied, the first defendant has appealed.

THE APPEAL

[11] The main issues raised by the first defendant in this appeal are:

(a) the burden of proof under sub-s 304(1) of the Companies Act 1965;

(b) whether the action against the defendants must be maintained in the same action taken against the company; and

(c) whether the first defendant is in fact liable under s 304(1) of the Companies Act 1965.

[12] After hearing the parties on the above issues, the appeal was adjourned to allow both learned counsel to make additional submissions on two respects; firstly, whether the plaintiff can file a separate or subsequent suit to declare a director who defrauded a creditor to be personally liable for the debt of the company under sub-s 304(1) of the Companies Act 1965; and secondly, what is the position in common law of such liability on the part of the directors.

[13] Both parties have made further written submissions. The decision of this court takes into account those further submissions.

[14] But first, before dealing with the above issues, it is necessary to consider the elements that must be established before a claim under s 304(1) of the Companies Act 1965 may be said to have been made out.

REQUIREMENTS OF S 304(1)

[15] Subsection 304(1) provides:

> (1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried out with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company may if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[16] The primary object behind sub-s 304(1) of the Companies Act 1965 is to statutorily provide for the lifting of the veil of incorporation in the specific circumstances of fraudulent trading with a view to ultimately pinning personal accountability and liability on the directing minds behind such trading of the

company. Subsection 304(1) affords the creditor of the company a civil remedy personally against such persons.

[17] This court recently had opportunity to consider the operation and ambit of sub-s 304(1) of the Companies Act 1965 in the case of *Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd* [2016] 2 CLJ 563. His Lordship, Justice Mohd Zawawi Salleh JCA, writing for the court succinctly observed that:

> [37] Section 304 of the Companies Act 1965 is aimed principally at curbing the possibility on the part of the officers of a company to act opportunistically and take advantage of the principle of the separate legal personality of a company and the principle of limited liability. As an exception to these principles, there are circumstances when the law duly acknowledges, and for which it accordingly provides the possibility, in very specific situations, for the corporate veil to be pierced. Once the corporate veil has been pierced the creditors of the company whose veil has been pierced may satisfy their claims from the personal assets of the company's shareholders.

[18] In another recent decision of *Lama Tile (Timur) Sdn Bhd v Lim Meng Kwang & Anor* [2015] 4 MLJ 85; [2015] 3 CLJ 763, the Court of Appeal said:

> [23] Section 304 is a specific statutory provision which allows the corporate veil to be lifted in the limited situations specified. Earlier in this judgment we have underlined that it is applicable in a situation where in the course of proceedings against a company, it appears that the business of the company has been carried on with intent to defraud creditors, a creditor can make an application to court to request that the court declare that any person who was knowingly a party to such carrying on of the business of the company, to be personally responsible. The evidence on this appeal shows precisely that. The directors and shareholders of LMK Edaran proposedly and knowingly engaged in a course of conduct to mislead the appellant (by adding the 'S' to the signboard), and but by the same token transferred the business of LMK Edaran to SLMK Edaran (previously Southern Taipan Sdn Bhd) to render LMK Edaran a dormant company.

[19] At the High Court, the learned judge was of the view that the plaintiff had to prove the following two elements in order to succeed in a claim under sub-s 304(1):

(a) that the business of the company has been carried out 'with intent to defraud creditors ... or for any fraudulent purpose'; and

(b) that the defendants 'who was knowingly a party to the carrying on of the business in that manner' within the meaning of sub-s 304(1) of the Companies Act 1965.

[20] We agree with the learned High Court judge but add that there is in fact a further requirement in sub-s 304(1) which must also be satisfied; and it

pertains to the discovery of the fraudulent trading.

[21] There are two instances under sub-s 304(1) when evidence of fraudulent trading may emerge. The first is when the company is being wound up; the second is in proceedings taken against the company.

[22] In the first situation, it is in the course of winding up the company when the liquidator, creditor or contributory of the company finds evidence of fraudulent trading. In such a case, either of them may apply to the court for an order under sub-s 304(1), the effect of which is to declare any person who was knowingly a party to such fraudulent trading to be personally liable for the debt or liability of the company.

[23] In the second scenario, proceedings have already been initiated against the company. And, it is in those proceedings that the fraudulent trading is discovered. It stands to reason that those proceedings against the company must have culminated in judgment being rendered in favour of the claimant. Until and unless that happens, the claimant is not a creditor in relation to the company. When that happens, the creditor may similarly apply to the court for the relevant order under sub-s 304(1).

[24] In *Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd*, the Court of Appeal further opined that what needs to be proved is this 'intent to defraud':

> [43] The phrase, 'with intent to defraud' is the most problematic element of s 304(1). The general proposition from the seminal case of *Morphitis v Bernasconi* [2001] 2 BCLC 1; [2003] Ch 552, is that for behaviour to fall under s 213(1) of the English Insolvency Act (which is in *pari materia* with our s 304 of the Companies Act 1965), there must be dishonesty in the form of incurring company debts by those in charge when either they know that they will not be repaid or there is a substantial and unreasonable risk that they will not be. Indeed, Chadwick LJ accepted counsel for the director's submission that –
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> > There is a distinction between a fraud on a person that gives rise to a claim in damages against the company and the carrying on of the business of the company with intent to defraud.
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> [44] In this instant appeal, it was the contention of the plaintiff that from the outset, the second and third defendants, who are both husband and wife and the directors managing the first defendant, knew that the first defendant would not pay the plaintiff when they invited the plaintiff to commerce work at the site. Furthermore, the defendants went to submit their progress claim relying on the plaintiff's progress claim.
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> [45] The learned JC made a finding of facts that based on the evidence available before her, there was no sufficient evidence to establish that the second and third defendants had acted fraudulently or with intention to defraud the plaintiff.

[46] We agree with the finding of facts by the learned JC. We have scrutinised the evidence on record and found that there was no sufficient evidence to establish that the second and third defendants had carried out the business with intent to defraud creditors or for fraudulent purpose. In our view, a mere failure to fulfil contractual obligation cannot support a claim in fraud. Rather, it is merely a breach of contract claim, which does not by itself constitute a claim in fraud.

[47] There was no cogent and convincing evidence to suggest that the second and third defendants had the intention of not performing their contractual obligations to the plaintiff when they approached and invited the plaintiff to undertake the contract works. In fact, there was a dispute whether the plaintiff was appointed lawfully as the sub-contractor to the project as there was no finality in the terms of the contract.

[48] This was not a case where the company was already in financial difficulties, and in debts, but continued to invite the plaintiff to undertake the contract works despite its directors having knowledge that the company had no reasonable prospect of paying the plaintiff for work done.

[49] We were not prepared to conclude, based on the evidence on the record, that the second and third defendants from the very beginning had decided not to pay the plaintiff when they invited the plaintiff to commence works at the site.

[50] Therefore, this grounds of appeal must fail.

[25] The orders that the court may make under sub-s 304(1) are extensive. Where the conditions are fulfilled, aside from the declaratory orders of accountability, the court may order the defendant(s) to be personally liable for all or any of the company's debts or other liabilities. The wide powers of the court under sub-s 304(1) are appropriate as it serves to ensure that accountability for such fraudulent acts is effective.

THE STANDARD OF PROOF

[26] Having established the requirements for a claim under sub-s 304(1), the next issue is the standard of proof that is required for such a claim.

[27] The learned High Court judge found the plaintiff's case proved on a balance of probabilities, rejecting the first defendant's submission that a standard of beyond reasonable doubt for a case of fraud in civil proceedings was required as was decided by the Federal Court in *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229. The judge chose instead to apply the lower degree of proof as established in *Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569, and followed in a series of decisions such as *Cyber Village Sdn Bhd v Illustra IT (M) Sdn Bhd & Ors* [2010] MLJU 1853; [2011] 4 CLJ 613; *LMW Electronics Pte Ltd v Ang Chuang Juay & Ors* [2010] 1 MLJ 185; *Dato' Gan Ah Tee & Anor (in their capacity as liquidators of Par-Advance Sdn Bhd (in liquidation)) v Kuan Leo Choon & Ors* [2012] 10 MLJ 706. It was the court's

view that this was because sub-s 304(1) itself uses the terms 'if it appears'.

[28] Again, this point arose and was addressed in *Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd*:

> [39] What is the standard of proof in civil fraud claims? In *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229, the court held that the correct standard of proof required for fraud in civil proceedings is 'beyond reasonable doubt'. The court had this to say –
>
> > ... In finding that the plaintiffs had failed to establish fraud on the part of the defendant, the learned judge had applied the 'beyond reasonable doubt' standard of proof, following the decision of the Privy Council in *Saminathan v Pappa* [1981] 1 MLJ 121; [1980] 1 LNS 174 (PC). Indeed, this was the correct test and standard of proof to use where fraud (as opposed to forgery) is alleged in civil proceedings, it (the alleged fraud) has to be proved beyond a reasonable doubt (per Steve Shim CJSS at p 230).
>
> [40] In our view, the standard of proof in s 304 (1), being a statutory provision, is an exception to the standard required for allegations of fraud in civil cases of common law causes of action in Malaysia. Clearly the Court of Appeal in *Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569; [2003] 4 CLJ 68 made an exception when it held that s 304(1) only uses the term if 'it appears' which indicates that a lower degree of proof is required. In construing s 304(1), the Court of Appeal held that –
>
> > It does not matter whether the section carries both civil and criminal liabilities. It does not matter whether there are other remedies. The question is whether on the facts, the case falls within the ambit of s 304(1) or not and whether this is a fit and proper case for the learned judicial commissioner to make the declaration that he did.
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> [41] In the case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] CLJ 584, the Federal Court finally set straight the principles applied in evaluating fraud in civil cases. It was decided by the Federal Court that –
>
> > The correct principles to apply is ... where it was stipulated that at law, there are only two standards of proof, namely beyond reasonable doubt for criminal cases and on the balance of probabilities. There is no third standard. Therefore, it is up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim, to find whether the standard of proof was attained. The criminal aspect of the allegation of fraud and the standard of proof required is irrelevant in the deliberation.
>
> [42] It must be noted that other jurisdictions such a Singapore has adopted the standard of balance of probabilities despite the infusion of a criminal element that the more serious the allegation of fraud the higher is the degree of proof, but still not as stringently as required in a criminal case (see *Tang Yoke Kheng (Trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR 263 at pp 270, 275).

[29] Consequently, we agree with the learned High Court judge on the applicable standard of proof for a statutory claim under sub-s 304(1). Not so much because this is the standard under civil fraud but because sub-s 304(1) itself sets the standard of proof that must be met. The term if 'it appears' is deployed in the provision and this clearly indicates that a lower degree of proof is required. That lower degree of proof is on a balance of probabilities. It cannot go any lower than the civil burden of proof.

SINGLE PROCEEDINGS?

[30] It is the submissions of learned counsel for the defendants that sub-s 304(1) did not envisage the plaintiff maintaining two separate actions. It is counsel's submission that the wording of sub-s 304(1) required the evidence of fraudulent trading to be uncovered in the course of winding up proceedings or in any proceedings against the company and, the action taken against the defendants in those same proceedings.

[31] Hence, the use of the words 'the court' as opposed to 'a court'; and the words 'on the application of the liquidator or creditor or contributory of the company' as opposed to words such as 'suit' or 'fresh proceedings'. Learned counsel's point is that this deliberate use of these words meant that the intention of Parliament was that sub-s 304(1) claims are to be part of the winding up of a company or in any proceedings against a company. The court was urged to read the words 'in the course of' conjunctively and applicable to both instances of winding up proceedings as well as any proceedings against a company.

[32] In essence, the submission here is that the action against both the company and the defendants must be taken in the same single action. That action may be to wind-up of the company; or any other proceedings against the company. It is in the course of either of these proceedings that evidence emerges of the fraudulent trading that the order under sub-s 304(1) is sought against the defendants. Given that the proceedings before the High Court were not winding up proceedings or any proceedings against a company, the defendants contended that the claim must be dismissed.

[33] This argument was rejected at first instance. The High Court was of the view that sub-s 304(1) did not require the court to make a declaration against directors of a company in the same action against the company. The application may be made in separate proceedings after proceedings had been taken against the company and judgment had been obtained against the company in those proceedings, as was the case in the present facts.

[34] The court below observed that in *Siow Yoon Keong*, separate action by

way of an originating summons seeking a declaration had been initiated to make Siow, the managing director personally liable. Although this issue was not taken up in that case, the learned High Court judge was of the considered opinion that if the court was of the view that sub-s 304(1) was inapplicable, it would have ruled accordingly despite no arguments being raised on the point. In fact, the High Court permitted separate proceedings to be taken against the managing director.

[35] This was similarly the case in *Cyber Village Sdn Bhd v Illustra IT (M) Sdn Bhd & Ors* [2010] MLJU 1853; [2011] 4 CLJ 613; *LMW Electronics Pte Ltd v Ang Chuang Juay & Ors* [2010] 1 MLJ 185; and *Dato' Gan Ah Tee & Anor (in their capacity as liquidators of Par-Advance Sdn Bhd (in liquidation)) v Kuan Leo Choon & Ors* [2012] 10 MLJ 706. In *Tang Eng Iron Works Co Ltd v Ting Ling Kiew & Anor* [1990] 2 MLJ 440, the court also agreed with the plaintiff's contention that an application under sub-s 304(1) may also be initiated prior to winding up of the company.

[36] We agree with the further submissions of learned counsel for the plaintiff that the action against the defendants are in any case, best taken in separate proceedings instead of in the same proceedings against the company. On a practical note, sub-s 304(1) ought not to be read literally as the court must first make a finding against the company before it can make the declaratory order and other consequential orders against the defendants. The Supreme Court in *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217; [1992] 1 CLJ (Rep) 331 was of the view that actions under sub-s 304(1) of the Companies Act 1965 should not be determined by way of affidavit evidence but by writ action. Every opportunity ought to be afforded to defendants to lead evidence to defend themselves. That is best served in trial proceedings after the plaintiff has established itself as a creditor of the company which is precisely the case here.

[37] Learned counsel for the plaintiff has also drawn our attention to several decisions from Singapore where the practice and the approach is the same; that the proceedings personally against persons such as directors are launched in separate proceedings from those taken against the company. See *M+W Singapore Pte Ltd v Leow Tet Sin & Anor* [2015] SGHC 10; [2015] 2 SLR 271; *Kon Yin Tong and another v Leow Boon Cher and others* [2011] SGHC 228; *Amrae Benchuan Trading Pte Ltd (in Liq) v Tan Te Teck Gregory* [2006] 4 SLR 969; *Lim Teck Cheng v Wyno Marine Pte Ltd (in liquidation)* [1999] 4 SLR 673; *Liquidator of Leong Seng Hin Piling Pte Ltd v Chan Ah Lek & Ors* [2007] 2 SLR 77.

[38] The position in the United Kingdom is quite different in several respects. Section 213 of the Insolvency Act 1986 deals with fraudulent trading.

It reads:

> (1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.
>
> (2) The Court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business above-mentioned are to be liable to make such contributions (if any) to the company's assets as the Court thinks proper.

[39] First of all, it is quite clear that the UK position envisages only one instance when such declaratory orders of personal liability for the company's debts may be made against someone other than the company, and that is in the course of liquidation proceedings.

[40] Further, the application may only be taken by the liquidator. In the Malaysian scenario, the application may be initiated by the liquidator or any creditor or contributory of the company.

[41] Finally, the orders that may be made are more restricted under s 213. Instead of the orders that one sees under our sub-s 304(1), the order that may be granted against such persons is to hold such persons liable to make such contributions (if any) to the company's assets as the court thinks proper. This is what happened in the facts in *Morphitis v Bernasconi* [2001] 2 BCLC 1; [2003] Ch 552 cited with approval by the Court of Appeal in *Aneka Melor*.

[42] We have looked at the position in Australia and we agree with learned counsel for the defendant that s 588G of the Corporations Act 2001 is of little assistance. The terms of that provision are markedly different from our sub-s 304(1).

[43] Having examined our provision very carefully, and bearing in mind the third requirement that must be met before a right of action under sub-s 304(1) may be invoked, we therefore agree with the learned High Court judge in this regard, that the defendants do not need to be sued in the same suit taken against the company. Indeed, separate proceedings ought to be taken. Since the plaintiff is relying on the second limb of sub-s 304(1), the plaintiff necessarily has to sue the company first, secure judgment in its favour which renders it the status of 'creditor' before the plaintiff can initiate an action under sub-s 304(1).

[44] Therefore, an action against the defendants under sub-s 304(1) need not be maintained in the same set of proceedings brought against the company.

ARE THE REQUIREMENTS OF SUB-S 304(1) SATISFIED?

[45] The plaintiff must first prove that the business of the company has been carried out with intent to defraud creditors or for any fraudulent purpose. Thereafter, the plaintiff has to prove that the defendants were knowingly parties to the company's carrying on of the business with intent to defraud creditors or for any fraudulent purpose.

[46] After examining the evidence led, the High Court was satisfied that both requirements were met.

[47] First, in relation to the company, the court concluded that the business of the company had indeed been carried out 'with intent to defraud creditors … or for any fraudulent purpose' after examining various pieces of evidence. Amongst the evidence considered by the court was the company's audited reports for the years 2002, 2003 and 2004, the speed at which the company's business premise was sold and the unusually large orders made by the company when the company did not appear financially able to pay for those orders.

[48] We have examined those same pieces of evidence and we agree with the findings of the learned High Court judge. The company was 'not in the position to pay its creditors when the debts would fall due' and this is evidenced by the company's non-payment for the purchases or even the judgment debt. It is also true that the company's audited reports for the years 2002, 2003 and 2004 show that the company 'was experiencing cash flow problem and was in financial difficulty' at the material time. The balance sheets show that the company had no reasonable prospect of paying its debts in 2003 and 2004.

[49] More important and of relevance is the fact that the defendants did not challenge or explain that the company was not in debt and that it was able to pay its creditors, especially the plaintiff.

[50] Despite knowing that it was not able to pay for its purchases, the company, under the directions of the defendants proceeded to place 'unusual large orders of raw material from the plaintiff during the material period'. SP1 testified that prior to 2000, the orders were small but after 2000, the orders increased and then stopped in 2004. The first defendant's explanation was that a company by the name of Lan Chian Lon Company had not paid for a RM600,000 order placed with the company. The company had not been able to collect on this debt. The company, in turn, could not pay the plaintiff.

[51] However, no documentary evidence of the transaction, be it an invoice or a purchase order, was produced to support this contention. In fact, even the

existence of this customer was not proved leaving the court with the conclusion that this contention was 'an afterthought and not credible'.

[52] We find no reason to disturb any of these findings of the learned High Court judge as well as the conclusion that the business of the company had been carried on with intent to defraud creditors such as the plaintiff. Without any evidence to support their assertions, the defence remains bare and bereft of credibility.

[53] In relation to the defendants, we also agree with the learned High Court judge who found both of them as knowingly parties to the carrying on of the business of the company with such intent. Consequently, the court ordered both of them to be personally liable for the sum claimed by the plaintiff.

[54] The court relied on the fact that the defendants were the only shareholders and directors of the company; that the second defendant ran the daily operations of the company, placing orders with the plaintiff at the material time despite knowing full well that the company was not able to pay and that it was not going to pay for the purchases from the plaintiff.

[55] As for the first defendant who had testified that he was not involved at all in the business of the company both physically and financially, the learned High Court judge rejected his defence. Aside from finding that this oral evidence was contrary to the pleaded defence that both defendants ran the company, the court was of the view that 'it defies common sense if his explanation that he knew nothing about the financial status of Pacific and he was not involved in the running of the factory were to be accepted'. The court found it 'extremely illogical to believe' that the entire business of the company was carried on by the second defendant who was an elderly lady at the material time.

[56] Another piece of evidence that swayed the learned High Court judge was the statutory declarations found in the company's audited reports for the years 2002, 2003 and 2004. These statutory declarations which were signed by the first defendant acknowledged that he was the director responsible for the financial management of the company. The court found it unacceptable that the first defendant signed these SDs without knowing their contents, especially in view of the clear statements in the SDs themselves that the contents of the SDs are to 'the best of his knowledge and belief correct'. It was the considered view of the learned High Court judge that such acknowledgement meant that the first defendant 'had actual knowledge of the grave financial situation and position' of the company. Yet, the first defendant allowed the company to incur further debts without any reasonable prospects of paying or creditors like the plaintiff being paid.

[57] In any case, the court accepted the evidence of SP1 who testified that he had dealt with the first defendant at the material time. The first defendant had placed orders with the plaintiff by telephone calls, fax and purchase orders. Although sales were also placed with another sales person of the plaintiff by the name of Shaun Teh at that same time, the court found that that did not detract from the fact that SP1 had personal knowledge of the transaction and was able to give credible evidence.

[58] We find no reason to disagree with the learned High Court judge. The intention of the defendants to defraud the plaintiff can be reasonably inferred from the circumstances: the company did not have a profit generating business at the material time yet the defendants placed these unusually large orders, and the defendants were unable to explain how they were going to honour the company's obligations. On the contrary, the defendants never even suggested that there was a reasonable prospect of the company paying the plaintiff. Under such conditions, the court was entitled to infer that the defendants knowingly were parties to the fraudulent trading of the company.

[59] In *R v Grantham* [1984] QB 675, a person may be found to be guilty of fraud if he intends by deceit to induce a course of conduct in another which puts that other's economic interests in jeopardy, even though he does not intend that actual loss should ultimately be suffered by that other. Since it has been shown that the company placed orders despite knowing that it could not pay or that there was no reasonable prospect that the plaintiff would be paid, it does appear that the business of the company 'has been carried out with intent to defraud' the plaintiff, a creditor of the company'. There is further ample evidence that proves that the defendants were knowingly parties to the carrying on of the business in that manner'. Consequently, the order of the High Court making the defendants personally responsible for the company's debt to the plaintiff is proper and within the ambit of sub-s 304(1).

[60] The first defendant had further invited the court to examine the previous dealings of the company with the plaintiff. That because the company did not owe the plaintiff any money for the period 1993–2002, the debt incurred between 2003 and 2004 should not render the claim a fit case within sub-s 304(1) of the Companies Act 1965. Next, the defendants argued that they should be absolved from liability as they had informed the plaintiff of the company's cash flow problems at the material time.

[61] Both arguments were rejected by the High Court and we agree with the decision of the learned High Court judge. The only relevant period for the purpose of sub-s 304(1) was the period between 2003 and 2004. So long as the plaintiff could prove that the debt was incurred during the period when the company was insolvent by ordering the goods from the plaintiff knowing that

the plaintiff had no reasonable prospect of being paid; that is sufficient proof for a case under sub-s 304(1). This was regardless that the transaction was a one-off transaction.

[62] As for the defence of absolution by reason of having informed the plaintiff at the material time of its cash flow problems, the court was of the view that while it accepted the defendant's submission that SD1 and SD2 had informed Shaun Teh of the company's cash flow problem, the court nevertheless found that the company's financial position for the years 2002, 2003 and 2004 were not specifically made known to the plaintiff. The court was inclined to infer from the sequence of questions and answers in SD1 and SD2's witness statements that the plaintiff was only told about the company's cash flow problem after the orders had been placed. According to the learned High Court judge:

> I am sure if Pacific Plastic had told the plaintiff that it was unable to pay for the goods before ordering them, the plaintiff as a prudent businessman would not have continued to supply the goods. This is what any reasonable businessman would do and it is basic common sense ...

[63] Consequently, this defence was also rejected by the court. We can find no fault with this finding which is amply supported by the evidence before the court below. Unlike the facts in *Aneka Melor*, there is cogent and convincing evidence to suggest that the defendants had from the beginning, the intention of not paying or seeing to the plaintiff being paid. The company was already in financial difficulties and in debt. Despite having knowledge that the company had no reasonable prospect of paying the plaintiff for the purchases made, the defendants who are the only directors of the company, went ahead with the purchases.

[64] Given the evidence and that we agree with the findings of the court below that this is a proper case to invoke sub-s 304(1) against the defendants, we do not find it necessary to deal with the question of whether the plaintiff can maintain an alternative cause of action under common law as pleaded. Subsection 304(1) is the statutory enunciation of the common law principle of piercing the veil of incorporation where there is fraud, the fact that the plaintiff has made this alternative plea does not alter the position that it has this right of action.

CONCLUSION

[65] We agree with the learned High Court judge that there is sufficient evidence to establish on a balance of probabilities that the defendants were dishonest when they incurred company debts with the plaintiff knowing at that

time that the debts owed to the plaintiff will not be repaid or there was a substantial and unreasonable risk that the plaintiff will not be paid.

[66] Accordingly, the appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Dzulqarnain Ab Fatar